

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



# 75-7125

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

\_\_\_\_\_  
Docket No. 75-7125  
\_\_\_\_\_

ROBERT A. McAULIFFE,

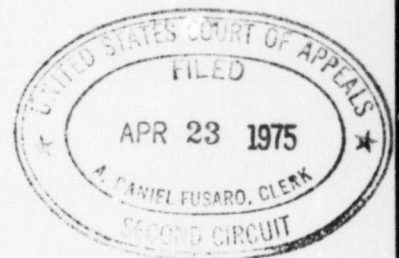
Plaintiff-Appellee-Appellant

vs.

ADOLF G. CARLSON,

Defendant-Appellant-Appellee

\_\_\_\_\_  
ON APPEAL FROM THE DISTRICT OF CONNECTICUT  
\_\_\_\_\_  
  
\_\_\_\_\_  
\_\_\_\_\_  
BRIEF OF THE PLAINTIFF-APPELLEE-APPELLANT  
\_\_\_\_\_  
\_\_\_\_\_



Michael J. Churgin  
Stephen Wizner  
Dennis E. Curtis  
127 Wall Street  
New Haven, Connecticut 06520  
Attorneys for Plaintiff-Appellee-Appellant

2

## TABLE OF CONTENTS

Table of Authorities.....	i
Statement of the Case.....	1
Issues Presented.....	3
Statement of Facts.....	3
Argument	
I. The Eleventh Amendment is not a Bar to the District Court's Order.....	5
II. The District Court Erred in not Awarding Attorneys' Fees.....	8
Conclusion.....	10

## TABLE OF AUTHORITIES

Cases

<u>Bradenburger v. Thompson</u> , 494 F.2d 885 (9th Cir. 1974).....	8,9
<u>Class v. Ncrton</u> , 505 F.2d 123 (2d Cir. 1974).....	8
<u>Edelman v. Jordan</u> , 415 U.S. 651 (1974).....	6
<u>Ford Motor Company v. Department of Treasury</u> 323 U.S. 459 (1945).....	6
<u>Hall v. Cole</u> , 412 U.S. 1 (1973).....	8
<u>Jackson v. Indiana</u> , 406 U.S. 715 (1972).....	9
<u>Johnson v. Harder</u> , slip op. 2519 (2d Cir. March 26, 1975).....	8
<u>McAuliffe v. Carlson</u> , 377 F. Supp. 896 (D. Conn. 1974).....	1,2
386 F. Supp. 1245 (D. Conn. 1975).....	passim
<u>Murray v. Wilson Distilling Co.</u> , 213 U.S. 151 (1909).....	6
<u>Parden v. Terminal Railway, Co.</u> 377 U.S. 184 (1964).....	5
<u>Philpott v. Essex County Welfare Board</u> , 409 U.S. 413 (1973).....	5,7
<u>Rothstein v. Wyman</u> , 467 F.2d 226 (2d Cir. 1972).....	6
<u>Sims v. Amos</u> , 340 F. Supp. 691 (M.D. Ala) aff'd 409 U.S. 942 (1972).....	8,9
<u>Souza v. Travisono</u> , 43 USLW 2402 (1st Cir. March 11, 1975).....	8

Statutes and Regulations

42 U.S.C. §405j.....	3
42 U.S.C. §407.....	5,7,8
20 C.F.R. §404.1601.....	3

Connecticut

4-68c.....	3,5
4-68g.....	2,4,5,9
17-318.....	2,3,9

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

Docket No. 75-7125

---

ROBERT A. McAULIFFE,

Plaintiff-Appellee-Appellant

vs.

ADOLF G. CARLSON,

Defendant-Appellant-Appellee

---

ON APPEAL FROM THE DISTRICT OF CONNECTICUT

---

---

BRIEF OF THE PLAINTIFF-APPELLEE-APPELLANT

---

Statement of the Case

The defendant Commissioner of Finance and Control of the State of Connecticut has appealed from a judgment of the United States District Court for the District of Connecticut (Newman, J.) ordering the return of social security disability benefits unconstitutionally taken from the plaintiff. The decision appealed from is reported at 386 F. Supp. 1245; the decision declaring the seizures to be unconstitutional is reported at 377 F. Supp. 896.

Plaintiff brought the initial action pursuant to 42 U.S.C. §1983 and its jurisdictional counterpart, 23 U.S.C. §1343, seeking declaratory relief that sections 17-318 in part and 4-68g in its entirety of the Connecticut General Statutes are unconstitutional and an order directing the defendant to return to plaintiff all monies seized. The court below held section 17-318 to be unconstitutional under the Equal Protection Clause of the Fourteenth Amendment on five different grounds noting that "the combination of all the classifying criteria plainly place the statute beyond the outer limits of even a restrictive view of the equal protection clause." 377 F. Supp. at 904. In addition, the district court found section 4-68g to be in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. 377 F. Supp. at 904-5. No appeal was taken from the judgment.

Judge Newman, however, declined to order a return of the property improperly seized: "No order appears necessary at present, since it is expected that, in light of this decision declaring the challenged statutes unconstitutional, defendant will agree to return to plaintiff the property taken from him." 377 F. Supp. at 906 n. 13. The defendant refused to return the moneys, and plaintiff moved for supplemental relief; the court ordered the return of the property seized, but declined to award attorneys' fees.

Issue Presented

The basic issue in this appeal is whether the Eleventh Amendment to the United States Constitution bars the district court from ordering the defendant to return plaintiff's social security benefits which were unconstitutionally used and seized.

Plaintiff has cross-appealed from that part of the judgment declining to award plaintiff attorneys' fees.

Statement of Facts

In its decision granting supplemental relief, the district court carefully set forth the basic facts which frame the issue presented:

Connecticut's Commissioner of Finance and Control, had taken two sets of funds belonging to plaintiff, and had applied the money to reimburse the State for expenses incurred in providing care for plaintiff at two State mental health facilities.

The first sum of money taken by defendant was \$1,098.07 in disability benefits due plaintiff under Title II of the Social Security Act. Plaintiff had been transferred to the Security Treatment Center, Middletown, from the Hartford Community Correctional Center, and §17-318 made all such transferees liable for the costs of their "hospitalization." To enforce this liability against plaintiff, defendant applied, under the authority conferred on him by Conn. Gen. Stat. §4-68c, to the Secretary of Health, Education and Welfare, who authorized defendant to receive plaintiff's social security benefits as "representative payee," 42 U.S.C. §405(j), 20 C.F.R. §404.1601, and to expend those funds for plaintiff's use and benefit.

Plaintiff himself never had control over or possession of these funds. They were sent directly to defendant as representative payee, and he, in effect, transferred them to himself as Commissioner of Finance and Control and billing agent for the State of Connecticut. McAuliffe I held the statute making plaintiff liable for his hospital costs unconstitutional as a denial of equal protection; this use of plaintiff's funds was therefore unlawful.

The second sum was \$150 over which plaintiff did initially have control. After being transferred from the Security Treatment Center to Norwich Hospital, plaintiff had begun receiving his own social security benefits pursuant to the Secretary's decision to remove the Commissioner as representative payee. Plaintiff had deposited his disability benefits in a patient's account at the hospital, expecting to draw on the account for his personal needs. Section 4-68g authorized defendant automatically to act as plaintiff's conservator. Defendant assumed this position for the purpose of paying the balance in plaintiff's account to himself, again as billing agent for the State, to cover plaintiff's hospital bill. Though plaintiff's obligation to pay these costs was entirely lawful, McAuliffe I held that defendant's automatic "appointment" as conservator violated due process requirements; defendant's acquisition of the \$150 was therefore unlawful.

386 F. Supp. at 1247. [Footnote omitted]

ARGUMENT

I. THE ELEVENTH AMENDMENT IS NOT A BAR TO THE DISTRICT COURT'S ORDER

The district court found that the State of Connecticut had waived the Eleventh Amendment's protection.<sup>1/</sup> The statute which authorized the defendant to act as representative payee for plaintiff's social security benefits provides that he is subject to "the same duties and obligations as are possessed and imposed upon guardians, conservators, administrators, and other fiduciaries ...." section 4-68c of the Connecticut General Statutes. Similarly, the statute naming the defendant as conservator for plaintiff and which authorized the seizure of his social security benefits in that role provides that the Commissioner shall "hold or use such property or funds for the support and benefit of such person in the same manner as a duly appointed conservator ...." section 4-68g.

<sup>1/</sup> Plaintiff argued below that the Eleventh Amendment does not apply to the instant case under the doctrine set forth in the Supreme Court's opinion in Parden v. Terminal Railway, Co., 377 U.S. 184 (1964). Plaintiff has not abandoned this position. By applying to be representative payee and serving as a conservator, the "State leaves the sphere that is exclusively its own." 377 U.S. at 196. Fulfilling a dual role, the defendant Commissioner qua representative payee of plaintiff's social security benefits, wrongfully paid the Commissioner qua billing agent in the first instance. In the second instance, the Commissioner assumed the role of conservator for plaintiff and seized his social security benefits. As representative payee and conservator, the defendant was not clothed with the protection of the Eleventh Amendment because he acted outside his official sphere. If defendant prevailed, he would be permitted to seize social security benefits in contravention of 42 U.S.C. §407, see Philpott v. Essex County Welfare Board, 400 U.S. 413 (1973), and be immune from suit by the benefit recipient. The district court classified the dual role as "somewhat unusual" but declined to base its holding on this distinction. 386 F. Supp. at 1248.

Upon review of the plain language of each statute, one may reach only one conclusion: waiver.

Each statute involved here very clearly imposes on the Commissioner the obligations normally associated with the offices he is empowered to assume. Such careful specification of obligations would be meaningless unless the legislature had contemplated that the normal means for enforcing such obligations would be available. The inference is thus inescapable that the Connecticut General Assembly has consented to suits against the Commissioner of Finance and Control to enforce fiduciary obligations assumed by him when he acts pursuant to the authority of Conn. Gen. Stat. §§ 4-68c and 4-68g.

386 F. Supp. at 1249. The defendant's references to Edelman v. Jordan, 415 U.S. 651 and Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972) only buttress Judge Newman's conclusion.<sup>2/</sup> The "overwhelming implications from the text ... leave no room for any other reasonable construction." Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909), quoted in Edelman.

<sup>2/</sup> Furthermore, Edelman v. Jordan is inapposite to the instant case. In that case, the Court held that the Eleventh Amendment barred a judgment against the State of Illinois to pay retroactive welfare benefits. The Court quoted approvingly the following passage from the Second Circuit's opinion in Rothstein v. Wyman, 467 F.2d 226, 236

"It is one thing to tell the Commissioner of Social Services that he must comply with the federal standards for the future if the state is to have the benefit of federal funds in the programs he administers. It is quite another thing to order the Commissioner to use state funds to make reparation for the past. The latter would appear to us to fall afoul of the Eleventh Amendment if that basic constitutional provision is to be concerned of as having any present force."

415 U.S. at 665. In the instant case, there is no question of reparations. It is undisputed that the monies involved are Mr. McAuliffe's social security disability benefits received from a federal insurance program which is federally administered which in no way involves the Connecticut Treasury. The funds involved were not state funds; the monies belonged to Mr. McAuliffe. Furthermore, he never gave the property to the Commissioner to test a state determination, cf. Ford Motor Company v. Department of Treasury, 323 U.S. 459 (1945); it was taken from him by the Commissioner qua fiduciary.

Judge Newman carefully reviewed the Connecticut law of fiduciary obligations and concluded that the defendant was liable for the monies seized. The defendants do not dispute the court's survey of the law, but present an 'equitable' argument. The argument is presented for the first time in this court and was never raised below; it is meritless. This suit is by a ward against his fiduciary; the monies in question were wrongfully applied by the fiduciary with regard to the billing while plaintiff was serving a criminal sentence. "The funds were taken not only in payment of an obligation unconstitutionally imposed, but also for the benefit of the fiduciary and the fiduciary's employer. Under all the circumstances, the breach of trust is patent, and restitution is a particularly appropriate remedy. 386 F. Supp. at 1250.

The defendant's "equitable" argument is particularly inappropriate in this case, especially with regard to the seizure from plaintiff's patient account. The defendant had no right to any of plaintiff's social security funds; by utilization of two unconstitutional statutes, he was able to seize the social security disability benefits. 42 U.S.C. §407 is uncompromising:

The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to operation of any bankruptcy or insolvency law.

As a unanimous Supreme Court held in Philpott v. Essex County Welfare Board, 409 U.S. 413, 415, "The language is all inclusive." In Philpott, New Jersey made an argument similar to defendant's. The Court was not persuaded.

New Jersey argues that if the amount of social security benefits received from the Federal Government had been made monthly, the amount of state welfare benefits could have been reduced by the amount of the federal grant. We see no reason to base an implied exemption from §407 on that ground. We see no reason why a State, performing its statutory duty to take care of the needy, should be in a preferred position as compared with any other creditor.

409 U.S. at 416. See also Johnson v. Harder, slip op. 2519 at 2520 n.2 (2d Cir. March 26, 1975). The judgment of the district court should be affirmed.

## II. THE DISTRICT COURT ERRED IN NOT AWARDING ATTORNEYS' FEES

It is now well-established that "federal courts, in the exercise of their equitable powers, may award attorneys fees when the interests of justice so require." Hall v. Cole, 412 U.S. 1, 4,5 (1973). See also Sims v. Amos, 340 F. Supp. 691 (MD. Ala) aff'd 409 U.S. 942 (1972).

Under the 'private attorney general' doctrine, an award of attorneys fees should be made to a litigant who (1) furthers the interests of a significant class of persons by (2) effectuating a strong congressional policy. The award serves the purpose of encouraging such public minded suits ... Under this doctrine, the good or bad faith of the defendant is irrelevant.

Bradenburger v. Thompson, 494 F.2d 885, 887 (9th Cir. 1974). See Class v. Norton, 505 F.2d 123, 127 n.1 (2d Cir. 1974); Souza v. Travisono, 43 U.S.L.W. 2402 (1st Cir. March 11, 1975). The district court noted its authority to award attorneys' fees but declined to do so.<sup>3/</sup> The court, however, did not discuss the "private attorney general doctrine," relying instead on the penalty and fund theories.

<sup>3/</sup> The Eleventh Amendment is not a bar to an award of attorneys' fees or costs. Class v. Norton, supra.

The judgment in the instant case affects thousands of persons presently confined in mental health facilities of this state and those recently confined. The statutory conservator provision declared unconstitutional (§4-68g) provided that all persons with income or assets of less than five thousand dollars, without notice or hearings, would be declared incompetent and have the Commissioner as the conservator. The remaining statute declared unconstitutional (§17-318) involved a challenge to billing practices and affords relief to all individuals transferred to mental health facilities from community correctional centers during the course of their incarceration.

"[S]ince Section 1983 expresses a strong policy of vindicating federal constitutional rights against infringement by state officials ..., the plaintiff furthered congressional policy by challenging the [Connecticut] statute" Brandenburger, supra, at 889. See Sims v. Amos, supra, 340 F. Supp. at 694. Therefore, an award of attorneys fees is appropriate "and a part of the effective remedy a court should fashion to encourage public minded suits," Sims v. Amos, supra at 694.

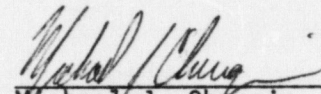
An award of attorneys' fees is particularly appropriate in the instant case. The rights of the mentally ill have long been neglected. As Justice Blackmun noted for a unanimous court in Jackson v. Indiana, 406 U.S. 715, 737 with regard to commitment procedures for mental patients, "Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power have not been more

frequently litigated." The judgment of the district court declining to award attorneys' fees should be reversed.

Conclusion

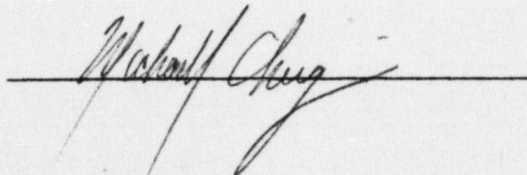
The judgment of the district court ordering the defendant to return to plaintiff the social security benefits seized should be affirmed. That part of the judgment denying plaintiff's motion for attorneys' fees should be reversed and the case remanded for the setting of the fee.

Respectfully submitted,

  
Michael J. Chargin  
Stephen Wizner  
Dennis E. Curtis  
Attorneys for Plaintiff-Appellee-  
Appellant  
127 Wall Street  
New Haven, Connecticut 06520  
(203) 436-2210

CERTIFICATION OF SERVICE

A copy of the foregoing brief has been served by mail, postage prepaid, on Maurice Myrun, Esq., 90 Brainard Road, Hartford, Connecticut this 18th day of April, 1975.



CS17-01